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IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1690

WAYNE A. STANTON, individually and as the Administrator of the Indiana Department of Public Welfare,

Petitioner,

v.

ELIZABETH BROWN and JAMES BROWN by his next friend MICHAEL BROWN, on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner, Wayne A. Stanton, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 30, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at page A-1. The opinion of the District Court for the Southern District of Indiana is appended at page A-18.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 30, 1980. This petition for *certiorari* was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the policy of the Indiana Department of Public Welfare was a proper implementation of the provisions of 42 U.S.C. § 1396a(a)(17) concerning the availability of income of a noninstitutionalized spouse to support an institutionalized spouse and the obtaining of that financial support.

2. Whether attorneys' fees must be awarded pursuant to 42 U.S.C. § 1988, where statutory grounds other than provisions of the Civil Rights Act serve as the basis for the Court's decision.

STATUTORY PROVISIONS INVOLVED

The Appendix hereto contains, at page 26, the provisions of 42 U.S.C. § 1396a(a)(17) and, at page 28, the full text of 42 U.S.C. § 1988.

STATEMENT OF THE CASE

This action was instituted on behalf of James Brown, an incompetent Medicaid recipient confined to a nursing home, by his guardian and by Mr. Brown's noninstitutionalized spouse seeking injunctive and declaratory relief against certain regulations adopted to implement the Indiana State Medicaid Plan. Mr. Brown's expenses had been in part paid by the Indiana Department of Public Welfare and by Mr. Brown himself. It was determined, based upon State welfare regulations, that Mrs. Brown should con-

tribute a certain portion of those expenses each month and that Medicaid funds would therefore not be used to pay any part of her share. However, Mrs. Brown did not pay her portion of Mr. Brown's expenses as required.

The Browns then filed this suit as a class action challenging State regulations which deemed part of her income to be available for Mr. Brown's support. Indiana Department of Public Welfare Regulation 2-214 §§ 3200, 3222, 3222.1, 3313 and 3432. The district court after trial on December 20, 1978, issued a memorandum opinion on February 16, 1979. The Court certified the class and held that in as far as the State regulations operated to set arbitrarily an amount to be deemed available for the institutionalized spouse's support, as an irrebuttable presumption, those regulations were invalid as conflicting with 42 U.S.C. § 1396a(a)(17) pursuant to the Supremacy Clause of the United States Constitution. However, the district court held that a contribution could be required for the support of the institutionalized spouse if a factual determination were made as to the income and actual expenses of the non-institutionalized spouse, with any amount left over to be considered available for payment to the institution. The Court then denied plaintiffs' request for attorney fees pursuant to 42 U.S.C. § 1988.

On appeal, the United States Court of Appeals for the Seventh Circuit held that the court below was proper in requiring an individualized factual determination and in abolishing any irrebuttable presumption arising from the application of a uniform mathematical formula. However, the appellate court also held that the state could not force contribution after that determination by a spouse who was able but unwilling to pay and that the state must then increase its Medicaid benefits to the institutionalized spouse

to assume the portion left unpaid while seeking reimbursement from the unwilling spouse. The court further held that in spite of the discretion on the part of the district court to assess awards of attorneys' fees, that discretion did not justify a denial of fees absent a finding of special circumstances. The court remanded the case to the district court with directions to determine the appropriate fee award. It is from the ruling of the Court of Appeals that review is now sought.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEALS AS TO THE PROPER INTERPRETATION OF 42 U.S.C. § 1396a(a)(17).

Section 1396a(a)(17) provides, in pertinent part:

> (a) A State plan for medical assistance must
>
> * * *
>
> (17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, . . .) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account *only such income and resources as are,* as determined in accordance with standards prescribed by the Secretary, *available to the applicant or recipient* . . . (C) *provide for reasonable evaluation of any such income or resources,* and (D) *do not take into account the financial responsibility of any individual* for any applicant or recipient of assistance under the plan *unless such applicant or recipient is such individual's spouse* or such individ-

> ual's child who is under age 21. . . . [Emphasis supplied].

In interpreting that provision to ascertain what the state may require of the noninstitutionalized spouse, the Seventh Circuit held that a contribution may be requested, after a factual determination as to each individual's ability to pay, but that if the noninstitutionalized spouse declines to pay, the state must increase its payments accordingly and bring suit for reimbursement. See p. 11 of the Appendix hereto. The court's ruling permits any such spouse, even one fully able to pay some part of the costs of institutionalization, to express an unwillingness to pay at any point and requires the state to begin immediately to pay the spouse's share.

In so holding, the court said the Indiana Attorney General could initiate legal action to compel payment by the noninstitutionalized spouse but did not consider the fiscal implications of the delay implicit in that procedure. Nor did the court cite any authority for such suits by the state Attorney General under Indiana statutes or case law but referred only to the Indiana *parental* responsibility provisions, saying that a spousal responsibility statute could be enacted. Appendix, p. 13, note.

The Seventh Circuit decision is in conflict with an opinion issued on January 28, 1980, by the Fifth Circuit Court of Appeals in *Norman v. St. Clair* and companion cases, reported at 610 F.2d 1228. In that case, the Fifth Circuit upheld Mississippi's regulations concerning the deeming of income wherein a statewide uniform set of allowances for needs were applied as deductions from net income. Mississippi, like Indiana, employs the more restrictive historical eligibility guidelines permitted by 42 U.S.C. § 1396a(f),

Public Law No. 92-603 § 209(b). See Appendix hereto at p. 27.

The Fifth Circuit held that Congress had clearly intended that a spouse assume responsibility for the other spouse and that no other relatives or children should bear that responsibility. 610 F.2d at 1236. That court also stated:

> We must reject plaintiffs' contention that 42 U.S.C. § 1396a(a)(17)(D) merely authorizes the states to invoke formal financial responsibility proceedings for the support of spouses. We hold instead that 42 U.S.C. § 1396a(a)(17)(D) permits states to deem income from one such spouse available to the other and that such deemed income is part of the "available" income which states may compute under 42 U.S.C. § 1396a(a)(17)(B).

Id., at p. 1237. In addition, the Fifth Circuit cited the need for a "reasonable approach" to the administration of welfare programs, at page 1238:

> . . . Without some form of deeming, spouses could shift all the income to one spouse, who might then either refuse to aid the other or incur exorbitant and unnecessary expenses, thus preventing aid to the eligible spouse. Indeed, the unemployed spouses of wealthy individuals could become prime candidates for Medicaid assistance. Such a result is bound to have been far from the intent of the Medicaid drafters.

The court allowed the expenses of the noninstitutionalized spouse to be estimated and held that excess amounts should be applied to the cost of care of the other spouse. Case, at 1242. Finally, the court found the state regulations in question to be a rational and acceptable method of controlling potential abuses of the Medicaid program. *Id.*, at 1243.

These conflicts justify the grant of *certiorari* to review the judgment below.

2. THE DECISION BELOW RAISES SUBSTANTIAL AND RECURRING PROBLEMS AS TO THE APPLICATION OF PRINCIPLES OF FEDERAL JURISDICTION AND AS TO THE INTERPRETATION OF A FEDERAL STATUTE, AND IS INCONSISTENT WITH DECISIONS OF OTHER CIRCUITS AS TO 42 U.S.C. § 1988.

The Court of Appeals for the Seventh Circuit, in reversing and remanding to the district court the issue of attorneys' fees which were requested by plaintiffs and denied by the district judge, may have, in effect, directed the trial court to award fees and thereby have deprived the court of its discretion inherent in the terms of 42 U.S.C. § 1988 to determine fee awards. The court of appeals has instructed the district court to make findings as to whether any special circumstances exist which would make the award of fees unjust, Appendix at p. 16, and has requested a determination concerning the reasonableness of the requested fee amount. *Id.*

In addition, the court discarded the contention implied in the district court's opinion and asserted by defendants on appeal that the resolution of the case on statutory rather than constitutional grounds constituted a special circumstance which made the award of fees improper, with the district court basing its refusal both on its own discretion to award fees and on the doctrines set forth in *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). The appellate court's opinion was an attempt to narrow still further the already limited authority of the trial court to limit fee awards, despite that court's immediate and

extensive knowledge of all circumstances of the case and of all activities of counsel.

While the opinion of the Seventh Circuit does not specify or attempt to define the special circumstances which it might find to be an acceptable basis for the denial or reduction of fees, the district court's ruling is consistent both with the need to protect the state's treasury and more important with the rule of decision enunciated by *Hagans v. Lavine, supra.* That case expounded upon the doctrine that, where both a statutory and a constitutional claim are presented in a complaint for relief, the federal district court should first attempt to resolve the dispute on statutory grounds and should reach the constitutional claim only where statutory grounds are not dispositive. *Id.*

Here, the district court's opinion was explicit in declaring that the case was decided solely on statutory grounds and that the constitutional claims were merely alleged but never argued or briefed. Appendix at p. 26. In an effort to be consistent with the principles of *Hagans, supra,* the district judge denied an award of fees and stated that the cause was in reality brought pursuant to the Supremacy Clause, alleging a federal-state statutory conflict, thus indicating that any allegations under 42 U.S.C. § 1983 were irrelevant and superfluous to the court's decision. That order was held erroneous by the Seventh Circuit without reasoning or authority. Appendix, p. 16.

This court has never directly addressed this issue generally or in the specific context of a suit brought by a legal services entity as representatives of more than one individual plaintiff. The ruling of the court of appeals presents serious questions as to potential unjust awards in situations where a frivolous § 1983 count is set forth, along with

a meritorious statutory claim not on constitutional grounds, but where the § 1983 count is not argued or basic to the court's decision. The appellate opinion appears to signify that the award of some amount for attorney fees is to be considered automatic. If that inference is not subject to the limiting oversight of district judges, the number of suits brought with one count alleging some § 1983 cause of action, genuine or more alarmingly not genuine, will increase drastically to the detriment of state efforts to maintain control over available funds.

The Seventh Circuit's apparent rule that there must be some fee award conflicts with at least three decisions from other circuits. First, the denial of fees to a successful civil rights plaintiff was upheld in *Aho v. Clark*, 608 F.2d 367 (9th Cir., 1979), a case involving the school breakfast program in Hawaii. The court cited the language of the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988, as the basis of the district court's discretion; the Act provides that the court "*may* award" [Emphasis supplied] attorneys fees but does not on its face mandate an award. The Ninth Circuit found that the award was not essential to attract counsel or to bring the existing program into compliance with federal provisions and that defendants had not acted in bad faith. *Id.*, 369-70. Second, another Ninth Circuit case upheld a denial of fees as within the court's discretion, no abuse of that discretion having been shown by the civil rights prevailing plaintiff. *Buxton v. Patel*, 595 F.2d 1182 (9th Cir., 1979).

Finally, the Second Circuit's holding in *Zarcone v. Perry*, 581 F.2d 1039 (2nd Cir., 1978), supports a close examination and limiting of fees by the district court. *Id.*, at 1041. The appellate court cited the purpose of the Act, namely to extend an incentive to individuals to press civil rights

deprivation actions and to remove the financial impediment of attorney compensation, and pointed out that Congress intended trial courts to exercise their discretion in a manner consistent with prior case law. *Id.* 1042. Upholding the denial of attorneys' fees to the plaintiff, the court found no financial disincentive to bring suit and pointed to the high chances for success on plaintiff's part as indicating there was no need for special efforts to attract competent counsel. The court warned against a "wooden" application of the *Newman* rule and emphasized the need for watchful and continued review of fee requests. *Id.*, at 1044. As in the case at bar, and given the principles of *res judicata*, as well as the ultimate contempt sanction, the conduct of defendant is unlikely to recur. *See also Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir., 1976) [district court's discretion in finding special circumstances]; F.R.C.P. 54(d) [district court to have discretion in taxing of costs]; *Maher v. Gagne*, 594 F.2d 336 (2nd Cir., 1979), *cert. granted* 100 S.Ct. 44; *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

The decision of the Seventh Circuit should, therefore, be reviewed. If the true purpose of the Civil Rights Attorneys Fee Awards Act is to be implemented, an award cannot be automatic and uncircumscribed but must be based upon verifiable facts and a tru civil rights cause of action. A writ of *certiorari* should be granted so that this Court may resolve the conflicts inherent in the court of appeals' ruling.

CONCLUSION

For these reasons, petitioner urges that a writ of *certiorari* should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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Appendix

APPENDIX

Opinion of the Seventh Circuit Court of Appeals:

Before CUMMINGS and PELL, *Circuit Judges*, and GRANT, *Senior District Judge*.

GRANT, *Senior District Judge*. This case involves a husband and wife who are no longer residing together due to a medical disability which requires the long-term institutionalization of one of the spouses. The court below ruled that, in computing the Medicaid benefits payable to the institutionalized spouse, the State of Indiana may consider the resources of the noninstitutionalized spouse as available to the institutionalized spouse—provided the state conducts individualized fact findings regarding the financial needs of the noninstitutionalized spouse before determining what is potentially available. The gravamen of this appeal is that the district court's judgment continues to permit the State of Indiana to enforce the spousal responsibility of a noninstitutionalized spouse through *the indirect method* of denying the institutionalized spouse his or her full Medicaid benefits, thereby raising the spector of eviction if spousal contribution is not forthcoming. Appellants suggest the proper procedure to enforce spousal responsibility is for the state to provide full benefits to the institutionalized spouse and to then initiate direct action against the unwilling noninstitutionalized spouse under a state spousal support statute.

This class action, brought under 42 U.S.C. § 1983,[1] was filed on behalf of James Brown, an incompetent Medicaid

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[1] Although jurisdiction has been neither raised as an issue nor denied by the court below, this court notes that plaintiffs' complaint, filed December 1, 1978, alleges jurisdiction under both 28 U.S.C. § 1331 and 28 U.S.C. § 1343. This observation is made to distinguish the recent holding in *Chapman v. Houston Welfare Rights Org.*, 99 S.Ct. 1905 (1979) wherein the Court ruled that jurisdiction under 28 U.S.C. § 1343 did not encompass a claim that a state welfare regulation is invalid because it conflicts with the Social Security Act. The *Chapman* Court distinguished a situation, such as in the case at bar, where jurisdiction under 28 U.S.C. § 1331 is alleged and the amount in controversy exceeds $10,000. 99 S.Ct.

recipient, by his guardian, together with his noninstitutionalized spouse, Elizabeth Brown, seeking declaratory and injunctive relief against regulations adopted as part of the Indiana State Medicaid Plan, I.C. 12-1-7-14.9; 42 U.S.C. § 1396 *et seq.* As a Medicaid recipient, Mr. Brown's expenses at his nursing home were partially paid by the Indiana Department of Public Welfare and the patient himself. Additionally, however, the defendant welfare officials had certain policies and regulations which required that Mrs. Brown pay a certain amount each month over to the nursing home. Her assigned amount was determined in accordance with a state-wide, uniformly applied mathematical formula that did not take into account her own individual financial needs. She was obliged to pay the money each month and, if she did not, the nursing home would be faced with a non-payment situation. Under the Indiana plan, Medicaid funds would not be used to pay any part of the amount assigned to Mrs. Brown. Apparently she was either unable or unwilling to pay her assigned amount to the nursing home. Defendants nevertheless *deemed* part of Mrs. Brown's income and resources to be "available", within the meaning of 42 U.S.C. § 1396a(a)(17)(B),[2] to the Medicaid recipient, Mr. Brown.

The Browns filed this class action to challenge the deeming regulations of defendants. The district court conducted

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1905, 1910, 1946. In addition, *Chapman* can be distinguished in that in the case at bar plaintiffs have made substantial constitutional allegations as well as the successful statutory allegation. The Court's holding in *Hagans v. Lavine,* 415 U.S. 528, 532-543 (1974), allows the conclusion that we continue to have jurisdiction to adjudicate the statutory claim under 28 U.S.C. § 1343. *Dunn v. New York State Dept. of Labor,* 474 F. Supp. 269, 274 (S.D.N.Y. 1979).

[2] 42 U.S.C. § 1369a(a)(17)(B) reads:

> (a) A state plan for medical assistance must—
> (17) include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient. . . .

a trial on December 20, 1978, and issued a Memorandum Opinion on February 16, 1979. The court certified the class and declared the challenged regulatory scheme[3] to be contrary to 42 U.S.C. § 1396a(a)(17) and thus invalid under the Supremacy Clause. The court stated: "By this ruling the court does not suggest that the state may not seek contributions from a noninstitutionalized spouse. . . . It is the arbitrariness and irrebuttable presumptiveness of the established limits as applied to any given case that renders the challenged state regulations invalid". p. 6 of Mem. Op. The court held that to comply with § 1396a(a)(17) of the Social Security Act, the Indiana welfare regulations must provide for a factual determination in each case that gives "due consideration to the individual obligations and particular needs of each spouse and family",[4] citing *Herweg v. Ray,* 443 F.Supp. 1315, 1319 (S.D. Iowa 1978), *appeal pending.* After ruling on the merits, the court denied the plaintiffs' request for attorney fees pursuant to 42 U.S.C. § 1988.[5]

Plaintiffs contend on appeal that (1) the lower court's ruling on the merits, although an improvement in the law, has erroneously stopped short of the required abolition of all Medicaid deeming, and that (2) plaintiffs have erroneously been denied attorney fees.

I—Medicaid Deeming

The section of the Social Security Act which is in issue, 42 U.S.C. § 1396a(a)(17), provides in part:

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[3] Indiana Department of Public Welfare Regulation 2-214, §§ 3200, 3222, 3222.1, 3313, and 3432.

[4] Plaintiffs have advised this court that in response to the judgment entered below, the Indiana General Assembly has passed "Senate Enrolled Act No. 457" which, among other things, requires the Department of Public Welfare to conform to the decision of the lower court.

[5] Section 1988 states, in pertinent part:

> In any actio or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(a) A state plan for medical assistance must—

* * *

(17) include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient . . ., (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account for financial responsibility of any individual for any applicant or recipient of assistance under the plan *unless such applicant or recipient is such individual's spouse* or such individual's child. . . . (Emphasis supplied.)

The crux of the problem is the apparent conflict between subparts (B) and (D) of Section 1396a(a)(17). Subpart (B) provides that only income and resources available to the Medicaid recipient shall be considered while subpart (D) suggests that income and resources of spouses can be considered.

At this juncture we should set out (1) plaintiffs' definition of "deeming" and (2) this court's perception of the levels of inquiry that confront courts faced with situations similar to the case at bar.

(1) Plaintiffs argue that deeming occurs either (a) where a participating state refuses to individualize the spousal responsibility, or (b) where a participating state punishes the institutionalized Medicaid recipient by depriving that person of his or her benefits because the spouse refuses to pay the assigned share of the costs of institutionalization.

(2) The first level of inquiry would be to determine the amount of income and resources belonging to the noninstitutionalized spouse that is potentially available for the

support of the institutionalized spouse. This determination must include consideration of factors such as living expenses that do not proportionately decline due to the absence of the institutionalized spouse. The need for an individualized factual determination, rather than an arbitrary irrebuttable presumption, was correctly expressed in the court below. In suggesting a scheme considered acceptable, the court stated: "The contemplated scheme would allow the state to require proof of the particular needs and individual obligations of each spouse and family, and would then deduct these verified sums from the existing resources and income to determine the amount, if any, that is reasonably available for support of the institutionalized spouse." Mem. Op. p. 7. *The district court's approach to this first level of inquiry is most equitable and is affirmed without change.* However, we must agree with plaintiffs' contention that the lower court's ruling fell short of the abolition of an irrebuttable presumption contained in what we perceive as the second level of inquiry, i.e., whether the income and resources of the noninstitutionalized spouse that have been determined to be potentially available are actually received by the institution on behalf of the disabled spouse. The resulting question then arises: *How shall the State of Indiana enforce upon an unwilling spouse the responsibility to contribute?*

This second level of inquiry has neither been addressed by this court nor by any other circuit,[6] but several district courts have confronted the deeming issue. In *Burns v. Vowell,* 424 F.Supp. 1135 (S.D. Tex. 1976), a spouse required 24-hour care in a nursing home. Plaintiff spouses challenged state regulations that included an irrebuttable presumption that income over a certain level was available to the institutionalized spouse without considering the actual needs or actual contribution of the ineligible spouse.

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[6] However, related appeals are pending in both the Eighth Circuit, *Herweg v. Ray,* 443 F.Supp. 1315 (S.D.Ia. 1978), and the D.C. Circuit, *Gray Panthers v. Secretary, Dept. of Health, etc.,* 461 F.Supp. 319 (D.D.C. 1978)

The *Burns* court defined deeming as "a bureaucratic decision to deem a portion of the income of the noninstitutionalized spouse available to the institutionalized spouse". 424 F.Supp. 1135, 1139. In granting a preliminary injunction,[7] the court ruled that subparts (B) and (D) of Section 1396a(a)(17) prohibited deeming, and addressed the level one inquiry by stating:

> Thus, while the income of a noninstitutionalized spouse can be considered, it must be done through the application of reasonable standards and not on the basis of an irrebuttable presumption that the money is available for the care and support of the institutionalized spouse. . . . Thus where nursing home care is made available to eligible recipients, their spouses cannot 'be held accountable beyond their means'.

424 F.Supp. 1135, 1141. The *Burns* court commented on the level two inquiry by stating: "The Texas relative responsibility law applies in this case but only insofar as it allows the state to demand reasonable payment from a spouse or parent who is able."[8] *Id.* It is noteworthy that in that court's preliminary injunction, the state welfare agency was ordered to pay, *pendente lite,* the full amount of the cost of the nursing care of the institutionalized spouse.

In *Franssen v. Juras,* 406 F.Supp. 1375 (D. Or. 1975), a three-judge district court faced a similar challenge by a class of plaintiffs wherein one spouse was an institutionalized Medicaid recipient and the other a noninstitutionalized spouse subject to state regulations that presumed the availability of income above a certain standard allowance. The *Franssen* court held that the state regulations were invalid as inconsistent with § 1396a(a)(17), and ad-

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[7] See note 9, *infra.*

[8] The court in *Burns* relied heavily on Deford, *The Medicaid Deeming Procedure; The Intolerable Financial Burden on The Non-Institutionalized Spouse,* Clearinghouse Review 12, May, 1976.

dressed the level two inquiry by noting that subpart (D) of § 1396a(a)(17) is:

> intended to authorize a *state* mechanism for enforcing financial responsibility of relatives, not to permit presumptions forbidden elsewhere in the statute. Oregon until recently had such a mechanism, but it never applied to Medical Assistance and the plaintiffs here had incomes well below the level that would have activated a demand for contribution. Nothing in our decision in this case, we should note, prevents the State from re-enacting a relative responsibility law and making it applicable to Medicaid, nor from making and enforcing regulations reasonably evaluating the income and resources actually available. We require only that such efforts to impose responsibility conform to federal law.

(Emphasis added.) 406 F.Supp. 1375, 1379.

In *Manfredi v. Maher,* 435 F.Supp. 1106 (D.Conn. 1977), the court similarly[9] declared that state welfare regulations that automatically attributed income from the noninstitutionalized spouse were invalid as inconsistent with § 1396 a(a)(17). The *Manfredi* court noted that Connecticut, as Indiana, is one of fifteen states which has elected to assess Medicaid eligibility on the basis of a historical standard, by referring to the state's medical plan which was in effect on January 1, 1972. 42 U.S.C. § 1396a(f). This has relevance in that certain 1977 regulations of the Department of Health, Education and Welfare are inapplicable to states that have exercised the § 1396a(f) option. These 1977 regulations, which apply to only 35 states, have limited any level two presumption of contribution, under the facts of *Manfredi,* to the first six months after the spouses cease to live together:

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[9] In *Manfredi,* both spouses were SSI eligible because they were, for example, aged; therefore, both received Medicaid or at least were Medicaid eligible. In the case at bar, Mrs. Brown is only 57 years old and admittedly not Medicaid eligible. We note this factual distinction, but do not consider it a barrier to the relevancy of the court's holding.

> Where both spouses apply as aged, blind or disabled or where both spouses are SSI eligible, *and cease to live together, income and resources are considered mutually available without proof of contribution for the first six months after the month they cease to live together in a common household. After that, only actually contributed income and resources may be considered in determining the eligibility or amount of assistance of either individual spouse.* 42 Fed. Reg. at 2686, 45 C.F.R. § 248.3(b)(2)(i) (emphasis supplied).

435 F.Supp. 1106, 1112.[10] After noting that this regulation did not apply to Connecticut, the *Manfredi* court nevertheless held that it was unreasonable, under 42 U.S.C. § 1396a(a)(17)(C), for the state to assess the income of two persons on the theory that they maintain a single household (which is HEW's criteria for determining eligibility for and amount of SSI benefits disbursed to an elderly person), when it is a recognized fact that one member of that couple is confined to a long-term medical care facility. The court continued:

> Such an assumption flies in the face of simple, economic reality, as the impoverished lifestyle of the named plaintiffs in this action clearly demonstrates. By comparison, it would be highly reasonable to treat such couples as separate individuals for Medicaid purposes;
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> * * *
>
> Indeed, the existence of [Connecticut support statutes] reinforces the cases for separate individual consideration of spouses in the plaintiff class, since

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[10] If the noninstitutionalized spouse is not SSI eligible, as in the case at bar, there is no six-month waiting period. 42 C.F.R. § 448.3 (b) (2) (ii) (1977). Regulations formerly appearing in C.F.R. Title 45 as Part 248 have been redesignated into Title 42 as Part 448. In light of the above regulations, the *Burns v. Vowell* case, *supra*, has been placed on the long term inactive list in the Southern District of Texas without a final hearing on the merits. See note 13, 435 F.Supp. 1106, 1112.

> they provide the Commissioner with a remedy to employ in cases of unwarranted neglect, where, for example, a wealthy individual refuses to support an institutionalized spouse, even though she would be financially able to do so. [Footnotes omitted.]

435 F.Supp. 1106, 1114-15.[11]

In *Gray Panthers v. Secretary, Dept. of Health, etc.*, 461 F.Supp. 319 (D.D.C. 1978), an organization of older adults brought suit to challenge the federal regulations,[12] which allow the 15 states electing the § 1396a(f) option to promulgate their deeming regulations. The court held that the federal regulations were invalid as inconsistent with 42 U.S.C. § 1396a(a)(17). In interpreting the "available to the applicant" language in subpart (17)(B), the *Gray Panthers* court interrelated subpart (D) in a footnote:

> Subpart (D) of the statute is not to the contrary. That subpart merely prohibits a state from taking into account the 'financial responsibility' of anyone except spouses and parents. While it may allow a state to enforce its financial responsibility laws against a spouse or parent, this subpart does *not* suggest that the amount of contribution from that person should be a deemed amount. In fact, this is exactly what Congress had intended subpart (D) to mean.
>
> The committee believes it is proper to expect spouses to support each other and parents to be held accountable for the support of their minor children

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[11] The court in *Manfredi* continued with a second basis for invalidating the Connecticut deeming regulations. As a lesser included holding, the court held that 42 U.S.C. § 407, which prohibits the invasion of any monies payable under the S.S.A. through "execution . . . or other legal process," prohibited the Connecticut scheme. The court found that the state system threatened the liable relative with the imminent probability that his or her spouse will be evicted from the nursing home if contributions are not promptly forwarded, and that such administrative coercion was included in § 407's prohibition of "other legal process".

[12] 42 C.F.R. §§ 435.734, 436.602 and 436.711.

> and their blind or permanently and totally disabled children even though 21 years of age or older. Such requirements for support may reasonably include the payment *by such relative, if able, for medical care.*
>
> S.Rep. No. 404, 89th Cong., 1st Sess. 78, *reprinted in* [1965] U.S. Code Cong. & Admin. News, pp. 1943, 2018 (emphasis added).

461 F.Supp. 319, 322, note 5. While the court's language in this footnote refers to "the amount of contribution" and the "deemed amount", the suggestion of enforcement through state responsibility laws implies that the fact of actual contribution should not be presumed.

Finally, two cases from the District of Minnesota suggest recent support for plaintiffs' position. In *Hanke v. Nyhus*, 470 F.Supp. 742 (D.Minn. 1979), a similar class of plaintiffs challenged state welfare rules that were construed as presuming the availability of income and resources of spouses, who are involuntarily living apart because one spouse is in a nursing home, without proof of actual contribution. The *Hanke* court, after noting that Minnesota, as Indiana, has taken the § 1396a(f) option, and after referring to the *Manfredi, Franssen, Burns* and *Gray Panthers* decisions, *supra,* held that:

> defendants' policy of considering personal property owned by the spouse of an institutionalized MA applicant an available resource regardless of whether the spouse will contribute the property to the applicant's use is inconsistent with the federal statute and regulations which require that only such income and resources as are available to the applicant be considered in determining eligibility for MA benefits. This conclusion in no way affects the right of the state to pursue any claim it may have for contribution from the noninstitutionalized spouse pursuant to relative responsibility laws.

470 F.Supp. 742, 746. *Nursing Home Residents' Advisory Council v. Kelly,* 470 F.Supp. 747 (D.Minn. 1979) was handed down the same day as the *Hanke* decision and the basic holding is identical except that *Hanke* dealt with personal property while *Kelly* dealt with a spouse's interest in real property.

We find that the district court cases discussed above represent the majority trend against all forms of deeming and therefore hold that administrative coercion resultant from state procedures which presume actual contribution is inconsistent with 42 U.S.C. § 1396a(a)(17). In light of the Indiana spousal support statute, I.C. 31-2-2-1,[13] we hold that the state welfare agency is required to make an upward adjustment in Medicaid benefits to compensate for the portion left unpaid by an unwilling spouse, and then to proceed under the above statute to seek reimbursement directly from the unwilling spouse. To hold otherwise would be to deny an eligible recipient his full benefits because of the

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[13] 31-2-2-1 reads:

> Support payments for dependents—Order for payment to clerk of court—Where any person or persons, by the terms of any court order or decree, is ordered to pay support money to or for the dependent wife, husband, father, mother, child or children of the person or persons, and the dependents are being supported in whole or in part by public funds, or where the parent of the dependents has sought the assistance of the agency designated to administer Title IV-D [42 U.S.C. §§ 651-660] of the federal Social Security Act, the court shall order that the payment of such support money be made to the clerk of the circuit court of the county wherein the decree or order is entered. When the support order is for a child or children who qualify for assistance under IC 12-1-7-1, or when the order is for a child or children whose parent has sought the assistance of the agency designated to administer Title IV-D of the federal Social Security Act, the court shall order that the payment of the support be made to the agency of state government designated to administer Title IV-D of the federal Social Security Act in compliance with the federal rules and regulations established for the administration of Title IV-D of the federal Social Security Act. The order shall contain the date when the first support payment is to be made and the frequency of the payments thereafter.

improper action of his or her spouse. *Cf. Gunn v. Toia,* 48 L.W. 2330 (N.Y. Ct. App. 1979).

A further justification for our decision exists in a recently promulgated federal regulation of the Health Care Financing Administration, 42 C.F.R. § 433.135 (1978), which reads in part:

> Subpart D—Third Party Liability
>
> § 433.135—Third party liability; determination of liability and collection procedures.
>
> (a)—*Basis and purpose.* This subpart implements sec. 1902(a)(25) and 1903(d)(2) of the Act by setting forth State plan requirements concerning—
>
> (1) The legal liability of third parties to pay for services provided under the plan; and
>
> (2) Treatment of reimbursements by a third party to a State for medicaid furnished under the plan.
>
> (b)—*Definitions.* For purposes of this subpart, "third party" means any entity that is or may be liable to pay all or part of the medical cost of injury, disease, or disability of an applicant or recipient of medicaid.
>
> (c)—*Requirements for State plans.* A State plan must provide that requirements of paragraphs (d)-(g) of this section are met.
>
> (d)—*Determining liability of third parties.* The medicaid agency must take reasonable measures to determine the legal liability of third parties to pay for services under the plan.
>
> (e)—*Payment of claims.* (1) If the agency has determined that—
>
> (i) Third party liability exists for part or all of the services provided to a recipient, and
>
> (ii) The third party will make payment within a reasonable time, the agency must pay only

> the amount, if any, by which the allowable claim exceeds the amount of the liability.
>
> (2) The agency may not withhold payment for services provided to a recipient if third party liability or the amount of liability cannot be determined, or payments will not be available, within a reasonable time.
>
> (f)—*Reimbursement for medicaid.* The agency must seek reimbursement for medicaid to the extent of a third party's legal liability if—
>
> (1) Liability is determined after medicaid is provided to an individual; or
>
> (2) Liability was determined before providing medicaid but the agency failed to make use of it.

We construe § 433.135(e)(2) as supporting our holding that the Indiana welfare agency must make an upward adjustment in the institutionalized spouse's Medicaid benefits if a contribution is not made by an able but unwilling spouse within a reasonable time. In addition, we construe § 435.133(f) as supporting our holding that the proper method of enforcing spousal responsibility is through the state spousal support statute.[14]

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[14] At oral argument counsel for the State of Indiana raised, without citation of authority or prior treatment in Appellees' Brief, the speculation that the State of Indiana would not have standing to proceed against the unwilling spouse. In light of our holding that the State is required to make an upward adjustment of benefits to compensate for an unwilling spouse, it is apparent that the State would have standing to bring an action for reimbursement. In general, a state Attorney General may institute such suits as he deems necessary for the enforcement of the laws of the state and the protection of public rights. 7 Am.Jr.2d *Attorney General* § 11. Both the Medicaid statute's general purpose of providing benefits to those eligible and the Medicaid regulations' (42 C.F.R. § 433.135(f) (1978)) specific requirement that the state seek reimbursement, support a conclusion that the Indiana Attorney General has standing against the unwilling spouse. In the *Franssen* case, *supra*, the court stated that "The relevant section [42 U.S.C. § 1396a(a)(17)(D)] is intended to authorize a *state* mechanism for enforcing financial responsibility of relatives, but it never applied to Medicaid assistance and the plaintiffs here had incomes well below the level that would have activated a demand for

II—Attorney Fees

The question is whether the district court erred in failing to award plaintiffs attorney fees under 42 U.S.C. § 1988, which reads in part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

As amended Pub. L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

The court below denied the request, stating:

> Plaintiffs' complaint was predicated upon constitutional claims under 42 U.S.C. § 1983 as well as upon a meritorious statutory claim that ultimately became the sole basis for the Court's decision, the Court

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[14] *continued*

contribution. *Nothing in our decision in this case,* we should note, *prevents the State from re-enacting a relative responsibility law and making it applicable to Medicaid, . . .*" (Emphasis supplied.) 406 F.Supp. 1375, 1379. We note that Indiana has recently enacted parental responsibility laws that have directly involved the state agency responsible for administering Title IV-D of the Social Security Act in the collection of support payments. I.C. 12-1-7-1.1; 31-2-2-1. As in *Franssen,* nothing in our decision prevents the State of Indiana from enacting a state spousal support statute that directly involves the Indiana Department of Public Welfare, or other appropriate state agency in the collection of spousal support payments. In any event, this standing issue is not presently before this court and should be resolved in an Indiana forum. The Supreme Court of Indiana, in *State v. Rankin,* 260 Ind. 228; 294 N.E.2d 604 (1973) *appeal after remand* 313 N.E.2d 705, stated that "the Attorney General need not state in his complaint the explicit legal basis for his authority to bring suit. When the opposing party raises the issue it is then up to the trial judge to determine from all the circumstances whether the Attorney General does have the authority to initiate the action." *Id.* at 605.

> having never reached the plaintiff's constitutional issues. . . . And most importantly, the plaintiffs were well acquainted with the numerous published precedents that had dealt with issues identical to those presented herein solely upon the plaintiffs' well-pleaded statutory claim. Under these circumstances the Court is unable to conclude that this action is properly classified as one to enforce the civil rights acts within the meaning and purpose of section 1988.

Mem. Op. at 7, 8.

In *Bond v. Stanton,* 555 F.2d 172 (7th Cir. 1977), we addressed a circumstance where plaintiffs brought suit under 42 U.S.C. § 1983, yet prevailed on statutory rather than constitutional grounds. In holding that attorney fees were nevertheless recoverable under 42 U.S.C. § 1988, we stated:

> It is equally clear that Congress intended that the act extend to statutory claims asserted under § 1983. Congress was aware that many § 1983 cases are, like the present case, decided on statutory rather than constitutional grounds and intended that Pub. L. No. 94-559 cover all such cases. See Remarks of Senators Kennedy and Abourezk, 122 Cong. Rec. S17052, 17053 (daily ed. Sept. 29, 1976), and of Representative Drinan, *id.* at H12159 (daily ed. Oct. 1, 1976).

555 F.2d 172, 174. We further held that the Eleventh Amendment does not bar such fee awards against state officials.

Although it is established that attorney fees may be awarded in cases such as the one at bar, such an award is subject to the limited discretion of the district court. As was stated in *Kimbrough v. Arkansas Activities Ass'n.,* 574 F.2d 423 (8th Cir. 1978):

> Our determination that the Act was intended to encompass the instant case does not, of course, require an award of attorney's fees. "[C]ourts have

> wide discretion in determining whether or not an award of attorney's fees is warranted, giving due consideration to the principle that the prevailing party should recover attorney's fees 'unless special circumstances would render such an award unjust.' " *Planned Parenthood v. Citizens for Com. Action,* 558 F.2d 861, 870 (8th Cir. 1977), *quoting Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, 88 S.Ct. 964, 19 L. Ed. 2d 1263 (1968).

574 F.2d 423, 427. Indeed, in our recent opinion in *Dawson, et al. v. Pastrick, et al.,* Slip Op. Nos. 78-1139, 78-1140 (7th Cir. May 31, 1979), we expressly characterized the trial court's discretion as narrow, and further reiterated that "In *Davis v. Murphy,* 587 F.2d 362, 364 (7th Cir. 1978), we noted that 'a prevailing plaintiff should receive fees almost as a matter of course.' " Slip Op. at 16.

In *Gagne v. Maher,* 594 F.2d 345 (2d Cir. 1979), the Second Circuit held that a district court erred in constricting its view of its own discretion by refusing to award any fee for time spent on the fee application. In the case at bar, we hold that the district court likewise erred in its constricted view that it lacked discretionary authority to award fees where the plaintiffs prevailed on a statutory rather than a constitutional claim. We, therefore, remand the attorney fees question to the court below to determine (1) whether the requested fees are exorbitant and (2) whether there are any special circumstances that would render such an award unjust. We note that the fact that plaintiffs are represented by Legal Services Organization of Indiana, which is in part federally funded, does not represent a special circumstance that would preclude an award. *Hairston v. R & R Apartments,* 510 F.2d 1090 (7th Cir. 1975).[15] As the case at bar stands, an award appears

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[15] Plaintiffs have additionally referred to the unpublished Memorandum in *WWRO, et al. v. Andreano, et al.,* No. 75-C-102 (E.D.Wisc. Oct. 30, 1978), where the district court likewise rejected the argument that a legal service type organization should be awarded a reduced fee because it is a publicly funded group.

appropriate; however, we shall defer to the expertise of the district court in determining the amount. Circuit Rule 18 shall not apply.

REVERSED AND REMANDED IN PART.

PELL, *Circuit Judge,* dissenting in part, concurring in part.

A result of the majority opinion reduced to a simple statement appears to me to be as follows. A is in a nursing home. Part of the attendant expenses are paid by the state. A's spouse is legally obligated to pay for A's support which in this case would be the amount above that paid by the state. A's spouse has income sufficient over and above his or her own needs to pay the amount of the nursing home bill the state has not paid. A's spouse does not wish to do so. A's spouse does not have to do so, and the state has to pay the whole cost.

I do not consider it an answer to say that the state can take action against the spouse to recover that which the spouse was legally obligated to pay. I think it unrealistic to think that the state will engage in a multiplicity of continuing individual lawsuits to recover the money that it should not have had to pay out in the first place. Under the majority opinion, there is an open invitation for the spouse to decide that he or she does not wish to make the excess payment. In this era of inflation, and giving consideration to the human inclination not to pay out money when one doesn't have to, I think it reasonable to conclude that few would decline the invitation.

Unfortunately, and with the greatest respect for the reasoning expressed in the majority opinion, it appears to me that once more a roadblock has been placed in the way of a reasonable and legal endeavor of state authorities to curtail unnecessary expenditures of public funds in social programs. I think the district court correctly struck down the "deeming" test, but provided a reasoned alternative to the state whereby the costs would be borne as they should be. I would adopt the opinion of the district court on this as-

pect of the matter as the opinion of this court, and therefore respectfully dissent from the majority opinion which overrules that part of the district court opinion.

I also agree with the district court's denial of attorney fees. The majority opinion in remanding on this issue indicates that fees are allowable under 42 U.S.C. § 1988. That section, however, provides for fees where actions are brought to enforce a provision of section 1983 of the Civil Rights Act. Elsewhere the majority opinion in finding jurisdiction relies only on 28 U.S.C. § 1331, which would not seem to encompass claims under section 1983, which claims are covered only under 28 U.S.C. § 1343.

I otherwise concur in the majority opinion.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

JUDGMENT ENTRY

This cause came before the Court for trial without a jury on December 20, 1978, during which testimony was given and evidence presented.

The Court, having examined the evidence, together with supporting memoranda filed by the parties entered an ORDER and MEMORANDUM OPINION on February 16, 1979 and now enters this JUDGMENT ENTRY. It is, accordingly, hereby:

1. ORDERED that this cause be certified as a class action pursuant to Rule 23(c)(1), 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure on behalf of all named institutionalized persons who have been, are or will be recipients of the Indiana Medicaid Program and their non-institutionalized spouses who have or will have their incomes and resources "deemed" available to said institutionalized spouses by Indiana State Department of Public Welfare Regulation 2-214, Medicaid Assistance Eligibility Manual §§ 3200, 3222, 3222.1, 3313 and 3432.

2. DECLARED that Indiana State Department of Public Welfare Regulation 2-214, Medical Assistance Eligibility Manual §§ 3200, 3222, 3222.1, 3313 and 3432 are contrary to the Social Security Act, 42 U.S.C. § 1396a(a)(17) and are thus invalid pursuant to the Supremacy Clause of the Constitution of the United States.

3. ORDERED that the Defendants, Wayne A. Stanton, Elizabeth Samkowski, their employees, agents, successors in office and all other persons in active concert with them are permanently enjoined from enforcing Indiana State Department of Public Welfare 2-214, Medical Assistance Eligibility Manual §§ 3200, 3222, 3222.1, 3313 and 3432.

4. ORDERED that Plaintiffs' request for attorneys' fees pursuant to 42 U.S.C. § 1988 is denied.

5. ORDERED that each party shall bear his/her own costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

This cause came before the Court for trial without a jury on December 20, 1979, during which testimony was given and evidence presented.

The Court, having examined the evidence, together with the supporting memoranda filed by the parties, and now being duly advised in the premises, hereby

ORDERS:

1. That the plaintiffs' request for class certification pursuant to Rule 23(c)(1), 23(a), and 23(b)(2) of the Federal Rules of Civil Procedure, is GRANTED, there being no objection thereto by the defendants. The Court accepts the plaintiffs' contention that the proper class consists of all named institutionalized persons who have been, are or will be recipients of the Indiana Medicaid Program and their noninstitutionalized spouses who have or will have their incomes and resources "deemed" available to said institutionalized spouses by the challenged regulations herein; if the parties are unable to agree upon proper notice and

notice procedures, the Court will review those matters at a later date;

2. That the plaintiff's request for declaratory relief pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure is GRANTED as set forth in the accompanying MEMORANDUM OPINION;

3. That the plaintiffs' request for permanent injunctive relief pursuant to 28 U.S.C. § 2202 against the challenged regulations is GRANTED;

3. That the plaintiff's request for attorneys' fees pursuant to 42 U.S.C. § 1988 is DENIED.

IT IS FURTHER ORDERED that the plaintiffs shall prepare a JUDGMENT ENTRY in accordance with this ORDER and accompanying MEMORANDUM OPINION, obtain the approval of the defendants as to its form, and forward it to this Court for signature.

Costs shall be borne accordingly.

IT IS SO ORDERED.

DATED this 16th day of February, 1979.

MEMORANDUM OPINION

By this action, the plaintiffs seek declaratory and injunctive relief, pursuant to 28 U.S.C. §§ 2201 and 2202, to declare invalid and to enjoin the enforcement of certain regulations of the Indiana State Department of Public Welfare that were promulgated as part of Indiana's participation in the jointly funded federal-state Medicaid program established by Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* The Medicaid program is designed to provide federal funds to participating states to provide medical benefits to the aged, blind and disabled, among others, where limited resources are insufficient to meet the costs of necessary medical services. Indiana is a participant in the Medicaid program, *Ind. Code* § 12-1-7-15, and has agreed to comply with all of the requirements for the Medicaid program set forth in the applicable provisions of the Social Security Act. *Ind. Code* § 12-1-2-12.

Specifically, the plaintiffs seek to have this Court declare invalid and enjoin the enforcement of Indiana State Department of Public Welfare Regulation 2-214, §§ 3200, 3222, 3222.1, 3313 and 3432, and the practices thereunder. These particular regulations require a non institutionalized spouse to make available all of his or her resources above a given base level and all of his or her income above a given base level to the support of a spouse institutionalized in a nursing home pursuant to Indiana's Medical Assistance Program for the Aged, Blind, and Disabled, which is Indiana's federally approved Medicaid plan. The plaintiffs are attacking the conclusive presumptions within the above regulations that resources and income are available to the institutionalized spouse from the non-institutionalized spouse regardless of whether such resources and income are *in fact* available.

These "deeming" regulations and the practices thereunder are alleged to be in violation of the governing provisions of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, as well as the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. Because this Court finds the statutory issue to be dispositive of the questions presented for resolution, the Court need not and should not reach the plaintiffs' constitutional issues. *See Rosado v. Wyman,* 397 U.S. 400, 402 (1970); *King v. Smith,* 392 U.S. 309 (1968).

Plaintiff James Brown, age 74, is permanently and totally disabled. He is inflicted with chronic brain syndrome which necessitates that he be afforded constant professional care and oversight. Therefore, in October of 1978, at the suggestion of his attending physician, Mr. Brown entered Mount Zion Geriatric Center. Plaintiff Elizabeth Brown thereafter contacted the Marion County Department of Public Welfare to initiate an application for Medicaid assistance for her institutionalized husband. In late November of 1978, Mrs. Brown was notified that her husband's Medicaid application had been approved but that pursuant to the challenged state regulations herein, Mrs. Brown was

considered to have available, or "deemed" to have available, certain family resources and a certain amount of her own monthly income for defraying the costs of Mr. Brown's nursing home care. Furthermore, Medicaid assistance was contingent upon her contributions as prescribed by state regulations. Under the state "deeming" regulations, Mrs. Brown would be required to surrender to the nursing home certain family resources, which included in her case all monies in joint bank accounts and the cash surrender values of three life insurance policies, that were in excess of $1,400.00 in amount (based upon an individual $700.00 exemption allowed for Mr. and Mrs. Brown). Furthermore, Mrs. Brown would be granted a living allowance of $300.00 per month plus an allowance for recurring monthly medical bills and monthly work related expenses, but all monthly income above that level, save for payroll taxes, etc., would be "deemed" to be available for Mr. Brown's nursing home expenses.

The precise issue for the Court's determination is whether the "deeming" of income and resources availability between spouses who are separated by institutionalization, as now permitted by the Indiana State Department of Public Welfare Regulation 2-214, §§ 3200, 3222, 3222.1, 3313 and 3432, violates the requirements of 42 U.S.C. § 1396 a(a)(17) of the Social Security Act.

Section 1396a(a)(17) provides, in pertinent part:

> (a) A State plan for medical assistance must—
>
> . . . . . .
>
> (17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, . . .) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account *only such income and resources as are,* as determined in accordance with standards pre-

> scribed by the Secretary, *available to the applicant or recipient* . . . (C) *provide for reasonable evalution of any such income or resources,* and (D) *do not take into account the financial responsibility of any individual* for any applicant or recipient of assistance under the plan *unless such applicant or recipient is such individual's spouse* or such individual's child who is under age 21. . . . (Emphasis supplied)

The clear language of the statute provides that a state Medicaid plan may only consider income and resources that are "available to the applicant" and must provide for a "reasonable evaluation of any such income or resources." This section of the act is supported by substantial and helpful legislative history that can be turned to for the resolution of the questions presented. The Senate Finance Committee in speaking of Section 1396a(a)(17) in their report upon the Medicaid statute stated:

> Another provision is included that requires states to take into account only such income and resources as . . . are *actually* available to the applicant or recipient.

S. REP. NO. 404, 89th Cong., 1st Sess. 78, *reprinted in* [1965] U. S. Code Cong. & Ad. News 1943, 2018 (emphasis added). When considering the purpose of the provisions of Section 1396a(a)(17), the Finance Committee stated:

> These provisions are designed so that the states will not *assume* the availability of income which may not, *in fact,* be available or *overevaluate* income and resources which are available.

S. REP. NO. 404, *supra* (emphasis added). The Finance Committee's report further stated:

> The Committee has heard of hardships on certain individuals by requiring them to provide support and to pay for the medical care needed by relatives. The Committee believes it is proper to expect spouses to support each other . . . . Such require-

> ments for support may reasonably include the payment by such [spouse], *if able,* for medical care.

Id. (emphasis added).

To date, every court that has been asked to judge the validity of state "deeming" regulations in light of the language of Section 1396a(a)(17) and the above quoted legislative history has found such regulations to be a violation of Section 1396a(a)(17). *Herweg v. Ray,* 443 F.Supp. 1315, 1319 (S.D. Iowa 1978); *Manfiedi v. Maher,* 435 F.Supp. 1106, 1114 (D. Conn. 1977); *Burns v. Varwell,* 424 F.Supp. 1135 (S.D. Texas 1976). This Court adopts the reasoning of those courts in holding that the Indiana Department of Public Welfare Regulation 2-214, §§ 3200, 3222, 3222.1, 3313 and 3432, which "deem" a computed portion of a noninstitutionalized spouse's resources and income to be available to offset an institutionalized spouse's expenses by an arbitrary formula, is contrary to the requirements of Section 1396a(a)(17) of the Social Security Act and is therefore invalid. By this ruling the Court does not suggest that the state may not seek contributions from a noninstitutionalized spouse. The infirmities in the present regulation are simply that resources and income over certain arbitrary amounts are "deemed" to be available to a noninstitutionalized spouse for contribution toward an institutionalized spouse's expenses, *even though* amounts "deemed" available are subject to certain exemptions and deductions. It is the arbitrariness and irrebuttable presumptiveness of the established limits as applied to any given case that renders the challenged state regulations invalid. As was stated in *Herweg v. Ray, supra* at 1319:

> In the Court's opinion, the state procedure must provide for a factual determination in each instance of the amount of the spouse's income which is in fact reasonably available for the support of the institutionalized spouse. Otherwise the procedures will be in conflict with 42 U.S.C. § 1396a(a)(17). Such determination must give due consideration to the indi-

> vidual obligations and the particular needs of each spouse and family.

This Court adopts the opinion expressed by the court in *Herweg* and extends its reasoning to include the determination of the amount of resources that are reasonably available for the support of an institutionalized spouse. Thus, to comply with the requirements of Section 1396a (a)(17) of the Social Security Act the Indiana Department of Public Welfare's regulations that establish guidelines for determining what resources and income are reasonably available must provide for a factual determination in each case that gives "due consideration to the individual obligations and the particular needs of each spouse and family." Such regulations will thereby provide guidelines for determining what resources and income are *actually available* and will be free of the infirmities that plague the present regulations, which only allow for a determination of what resources and income are *considered available.* The contemplated scheme would allow the state to require proof of the particular needs and individual obligations of each spouse and family, and would then deduct these verified sums from the existing resources and income to determine the amount, if any, that is reasonably available for support of the institutionalized spouse. "This approach would appear decidedly more flexible and equitable in its overall operation and furtherance of congressional intent." *Herweg v. Ray, supra* at 1320.

The final issue that merits discussion is the plaintiff's request for attorneys' fees pursuant to 42 U.S.C. § 1988. Section 1988 states, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Plaintiffs' complaint was predicated upon constitutional claims under 42 U.S.C. § 1983 as well as upon a meritorious

statutory claim that ultimately became the sole basis for the Court's decision, the Court having never reached the plaintiffs' constitutional issues. Indeed, the plaintiffs are relying upon pleaded constitutional claims that were neither the basis for the Court's decision nor adequately briefed or argued to support a petition for attorneys' fees. Furthermore, the plaintiffs were surely aware that if they joined available constitutional claims under one or more of the fee-sections of section 1988, the Court would nonetheless be reluctant to consider and decide such constitutional claims where a non-constitutional claim is dispositive of the questions presented. *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). And most importantly, the plaintiffs were well acquainted with the numerous published precedents that had dealt with issues identical to those presented herein solely upon the plaintiffs' well-pleaded federal statutory claims. Under these circumstances, the Court is unable to conclude that this action is properly classified as one to enforce the civil rights acts within the meaning and purpose of section 1988. For these reasons, the Court, in exercising its discretion under section 1988, must deny the plaintiffs' request for attorneys' fees in this action.

STATUTES

42 U.S.C. § 1396a(a)(17):

"(a) A State plan for medical assistance must—

. . . . . .

"(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, . . .) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account *only such income and resources as are,* as determined in accordance with standards prescribed by the Secretary, *available to the applicant*

or recipient . . . (C) *provide for reasonable evaluation of any such income or resources,* and (D) *do not take into account the financial responsibility of any individual* for any applicant or recipient of assistance under the plan *unless such applicant or recipient is such individual's spouse* or such individual's child who is under age 21. . . ."

42 U.S.C. § 1396a(f)

(f) Duty of State to provide medical assistance as determined by effective date of State plan. Notwithstanding any other provision of this title [42 USCS §§ 1396-1396d, 1396f-1396i], except as provided in subsection (e), no State not eligible to participate in the State plan program established under title XVI [42 USCS §§ 1381 et seq.] shall be required to provide medical assistance to any aged, blind, or disabled individual (within the meaning of title XVI [42 USCS §§ 1381-1383c]) for any month unless such State would be (or would have been) required to provide medical assistance to such individual for such month had its plan for medical assistance approved under this title [42 USCS §§ 1396-1396d, 1396f-1396i] and in effect on January 1, 1972, been in effect in such month, except that for this purpose any such individual shall be deemed eligible for medical assistance under such State plan if (in addition to meeting such other requirements as are or may be imposed under the State plan) the income of any such individual as determined in accordance with section 1903(f) [42 USCS § 1396b(f)] (after deducting any supplemental security income payment and State supplementary payment made with respect to such individual), and incurred expenses for medical case as recognized under State law) is not in excess of the standard for medical assistance established under the State plan as in effect on January 1, 1972. In States which provide medical assistance to individuals pursuant to clause (10)(C) of subsection (a) of this section, an individual who is eligible for medical assistance by reason of the requirements of this section concerning the deduction of incurred medical expenses from income shall be con-

sidered an individual eligible for medical assistance under clause (10)(A) of that subsection if that individual is, or is eligible to be (1) an individual with respect to whom there is payable a State supplementary payment on the basis of which similarly situated individuals are eligible to receive medical assistance equal in amount, duration, and scope to that provided to individuals eligible under clause (10)(A), or (2) an eligible individual or eligible spouse, as defined in title XVI, with respect to whom supplemental security income benefits are payable; otherwise that individual shall be considered to be an individual eligible for medical assistance under clause (10)(C) of that subsection. In States which do not provide medical assistance to individuals pursuant to clause (10)(C) of that subsection, an individual who is eligible for medical assistance by reason of the requirements of this section concerning the deduction of incurred medical expenses from income shall be considered an individual eligible for medical assistance under clause (10)(A) of that subsection.

42 U.S.C.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not

adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Indiana Code (1936) 12-1-7-18, as amended 1969, 1968:

Medical assistance—Eligibility.—Medical assistance shall be granted to an applicant who is eligible for medical assistance under one [1] of the categories set out in Section 14.9(a) [12-1-7-14.9(a)] of this chapter and who:

(1) Has made an application or request for medical assitance [sic] in the manner prescribed by the state department or for whom such an application or request has been made;

(2) Is a resident of this state, . . . ;

(3) Has not made a transfer of property for the purpose of making himself eligible for medical assistance; and

(4) Has no spouse able to furnish medical assistance.

. . .

Indiana Code (1978) 12-1-7-14.9(f), as amended 1979:

(f) "Immediate family" means:

(1) A medical assistance applicant's spouse and de-

pendent children under twenty-one [21] years of age, if the applicant is married; or

(2) A medical assistance applicant's parents or, if divorced, the parent having custody, and the dependent children under twenty-one [21] years of age of the parents or parent, if the applicant is not married and is under twenty-one [21] years of age.

I.C. (1979) 12-1-7-18.6. Medical assistance — Eligibility —Income available to pay for medical care.—(a) For the purpose of this section, "income" means total income of the immediate family or, if an individual is employed, total income less employment expenses allowed by rule of the department.

(b) If the immediate family of an applicant for, or recipient of, medical assistance who is to be placed, or is placed, in a medical institution has an annual income (I) greater than the amount (A) set out in the schedule for that size family in subsection (d), the amount of the excess (E) is presumed to be actually available to pay for the medical care of the applicant or recipient.

Expressed mathematically:

$$E = I - A$$

(c) If the immediate family believes that that excess is not actually available to pay for the medical care of that applicant or recipient, it shall request the county department of public welfare to determine, according to standards prescribed by rules adopted under IC 4-22-2 [4-22-2-1—4-22-2-12], what portion of the immediate family's income is actually available to pay for the medical care of that applicant or recipient. The department may not increase the excess (E) determined by the formula set out in subsection (a). An appeal of the county department's determination may only be made according to the procedures set out in IC 12-1-2-2(b).

(d) The following schedule shall be used to determine what amount is to be subtracted from an immediate family's annual income under subsection (a):

Immediate Family Size	Amount To Be Subtracted
1	$5,000
2	$8,500
More than 2	$8,500, plus $2,000 for each additional person over 2 persons

The income levels set out in this section shall be adjusted annually by the department by adding to the income levels an amount equal to the income level for the preceding calendar year multiplied by the percentage increase in the national average consumer price index as reported by the Bureau of Labor Statistics of the United States Department of Labor. The percentage increase shall be obtained in the following manner:

(1) STEP ONE, subtract from the national average consumer price index for December of the previous year, the national average consumer price index for December of the year preceding that year.

(2) STEP TWO, divide the difference obtained under STEP ONE by the national average consumer price index for December of the latter year.

(e) The excess (E) may be used by the department to pay for the medical care of the recipient described in subsection (b). [IC 12-1-7-18.6, as added by Acts 1979, P.L. 125, § 3.]

Indiana Administrative Code 470 IAC 9-3-3:

(13) Income from Legally Responsible Relatives. Under the Medical Assistance program, financial responsibility of any individual for the MA applicant or recipient is limited to the responsibility of spouse for spouse and of parents for children under age twenty-one (21), blind, or disabled.[1]

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[1] [Social Security Act, Section 1902(a); Title 45, Code of Federal Regulations, Chapter II, Section 248.3; I. C. 12-1-7-18; State Department Regulation 2-108 *[470 IAC 2-1-8]]*

No other relative can be considered a responsible relative under the Medical Assistance program.

(13.1) Income of Spouse. All countable income of the self-supporting spouse in excess of the amount exempt for maintenance needs and medical needs, if applicable, shall be considered as available, along with the countable income of the MA applicant or recipient, to apply toward the cost of the medical expenses of the applicant or recipient.[2]

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[2] [State Department Regulation 2-108 *[470 IAC 2-1-8]]*

Supreme Court, U. S.
FILED
MAY 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1690

WAYNE A. STANTON, individually and as the Administrator of the Indiana Department of Public Welfare,

Petitioner,

v.

ELIZABETH BROWN and JAMES BROWN by his next friend MICHAEL BROWN, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1690

WAYNE A. STANTON, individually and as the Administrator of the Indiana Department of Public Welfare,

Petitioner,

v.

ELIZABETH BROWN and JAMES BROWN by his next friend MICHAEL BROWN, on behalf of themselves and all others similarly situated,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Elizabeth Brown and James Brown, by his next friend, Michael Brown, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, appears in Petitioner's Appendix at p. A-1. The court of appeals' amendment of that opinion, dated February 29,

1980 appears in Respondents' Appendix at p. A-1. The opinion of the District Court for the Southern District of Indiana appears in Petitioner's Appendix at p. A-18.

QUESTIONS PRESENTED

Pursuant to Rule 40(3) of the Rules of the Supreme Court of the United States, respondents concur with petitioner's statement of the second question as it appears in his Brief, p. 2, but restate question #1.

1. Whether 42 U.S.C. § 1396a(a)(17) prohibits states participating in the Medicaid program from deeming that a certain portion of a non-institutionalized spouse's income and resources is available for the partial payment of an institutionalized spouse's nursing home care even when the deemed amount is tailored to her own particular ability to pay and, further, whether the statute requires states, in the event the non-institutionalized spouse fails to pay her assigned portion, to make an upward adjustment in the amount of Medicaid benefits they pay on behalf of the nursing home resident.

STATEMENT OF THE CASE

Pursuant to Rule 40(3) of the Rules of the Supreme Court of the United States, respondents concur with petitioner's statement of the case but wish to make two clarifications. First, the Browns filed this lawsuit challenging state regulations which deemed part of Mrs. Brown's income and *resources* (bank accounts and life insurance policies) to be available for Mr. Brown's support. Second, the court of appeals remanded the case to the district court to determine an appropriate award of attorney fees only if the district court first found that the requested fees were not exorbitant and that no special circumstances existed to render an award unjust.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Court of Appeals Fully Considered and Correctly Decided All Issues Regarding the Proper Interpretation of 42 U.S.C. § 1396a(a)(17).

James Brown, respondent herein, is an adjudicated incompetent whose son, Michael, acts as his guardian. Mr. Brown, suffering from chronic brain syndrome, is unable to remember simple facts, refuses to change clothes or bathe, and is unable to control his body functions. Unable to care for or control her husband and upon a physician's recommendation, Elizabeth Brown, James' wife of thirty-five (35) years, arranged to have him moved into a nursing home in October 1978. At this same time she contacted the Welfare Department to request that James Brown be certified as eligible for participation in the Medicaid program which is a jointly-funded (federal-state-county) welfare program designed to provide medical assistance to low income persons. The Welfare Department certified James as Medicaid eligible but required that Mrs. Brown, in accordance with a uniformly applied mathematical formula embodied in state regulations, pay part of the nursing home expenses out of her own income and resources.

The Browns were in a dilemma because Elizabeth was simply unable to pay her assigned share to the nursing home and James desperately needed professional, twenty-four (24) hour care. Rather than obtain a divorce, which would have rendered Mr. Brown totally eligible in his own right, they challenged the state regulations in federal district court. On February 16, 1979, the court declared that the regulations were contrary to 42 U.S.C. § 1396a(a)(17) insofar as they acted to arbitrarily and irrebuttably assume or deem that certain portions of Mrs. Brown's income and

resources were "available" for the cost of her husband's care when, in fact, they were not. The court ordered the defendant welfare officials to tailor Mrs. Brown's financial obligations to her individual ability after taking into account all of her other needs and obligations. On appeal, the Seventh Circuit affirmed the district court's order for individualized treatment of non-institutionalized spouses like Mrs. Brown. Petitioner's Appendix, p. 5.

However, the Seventh Circuit also addressed a "second level of inquiry" and held that Indiana could not assume that an able spouse would always actually pay her assigned share to the nursing home. The court reasoned that if Indiana were allowed to deem an able spouse's contribution to the cost of the spouse's nursing home care, then upon her refusal to actually so contribute, the Medicaid recipient would be in an extremely vulnerable position "raising the spector of eviction" from the nursing home. See Petitioner's Appendix, p. 1.

But even more importantly, the Seventh Circuit ruled that 42 U.S.C. § 1396a(a)(17) could not be internally consistent with any other interpretation. That statute provides:

> (a) A state plan for medical assistance must—
> (17) include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient . . . , (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any appli-

> cant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child . . .

Specifically, the Seventh Circuit held that Indiana was authorized by subpart (D) of § 1396a(a)(17) to require non-institutionalized spouses to defray part of the cost of their spouse's nursing home care, but that subpart (B) required Indiana, in determining the exact amount of Medicaid funds which it would pay to the nursing home, to take into account only that income and resources which the spouses actually paid to the nursing home.[1] The Seventh Circuit explained that in the event that an able, non-institutionalized spouse refused to meet her financial obligations to the nursing home, Indiana would be required under subpart (B) to make an upward adjustment in the amount of Medicaid benefits it pays on behalf of the recipient; and then, in accordance with subpart (D), the state could take all steps necessary to make full and proper collection from the unwilling spouse.

The appellate court thus fully resolved any apparent conflict between the requirement of subpart (B) to consider only actually available income and resources and the authorization of subpart (D) to impose financial requirements on non-institutionalized spouses. Furthermore, it removed the possibility of a Medicaid recipient being harshly evicted from a nursing home whenever his able spouse

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[1] The Senate Finance Committee in speaking of Section 1396a(a)(17) in their report upon the Medicaid statute stated:

> Another provision is included that requires states to take into account only such income and resources as . . . are actually available to the applicant or recipient . . .
>
> These provisions are designed so that the states will not assume the availability of income which may not, in fact, be available or overvaluate income and resources which are available.

S. Rep. No. 404, 89th Cong., 1st Sess. 78, *reprinted in* [1965] *U.S. Code Cong. & Ad. News* 1943, 2018.

refused to meet her obligations. "To hold otherwise would be to deny an eligible recipient his full benefits because of the improper action of his or her spouse." Petitioner's Appendix, p. 11-12.

In conflict with the Seventh Circuit's decision below is the Fifth Circuit's opinion in *Norman v. St. Clair,* 610 F.2d 1228 (5th Cir. 1980) which held that non-institutionalized spouses must pay specified sums, unrelated to individual ability, to the nursing home care of their institutionalized spouses. In reaching this conclusion the Fifth Circuit ignored the incongruity of allowing the eviction of a Medicaid recipient from a nursing home solely because of his spouse's inability or even refusal to make payments.

Furthermore, the Fifth Circuit untenably concluded that the actually "available" language of 42 U.S.C. § 1396a(a)(17)(B) was somehow compatable with a blind assumption that a spouse could and would meet financial obligations imposed by subpart (D). *Norman v. St. Clair,* 610 F.2d at 1237. It justified this strained reconciliation of subparts (B) and (D) by speculating that with a different result, spouses would shift all income and resources to the non-institutionalized spouse and then states would be required to pay the full nursing home bills while the wealthy non-institutionalized spouse paid nothing. *Id.* at 1238, *quoted with approval in* Petitioner's Brief, p. 6. However, this speculative scenario is flawed by the simple fact that states participating in the Medicaid program are free to deny benefits to applicants who have transferred property for the purpose of becoming eligible for Medicaid. *See* Ind. Code §§ 12-1-5-1, 12-1-6-1, 12-1-7-18, 12-1-7.1-1.[2]

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[2] Of course the Seventh Circuit's resolution of this scenario would be to allow the states to make full collection efforts against able but unwilling spouses.

Petitioner has asserted that this Court ought to settle the full gamut of conflicts between the Seventh and Fifth Circuits in these medicaid "deeming" cases. However, that would be inappropriate since the Indiana General Assembly has intervened in the controversy by amending state law to provide, in effect, that financial obligations of non-institutionalized spouses will always be made by making an individualized, factual determination of such spouse's actual ability to contribute. This state law, Ind. Code § 12-1-7-14.9 (f) (Petitioner's Appendix, p. 29-31), perfectly conforms with the district court's holding below and obviates the need for this Court to decide if Indiana is allowed to take a different approach pursuant to 42 U.S.C. § 1396(a)(17).[3]

If this Court is to settle any conflicts between the Fifth and Seventh Circuits, it should be limited to the narrow question of whether 42 U.S.C. § 1396a(a)(17) allows the states to assume that an "able" spouse will always pay her assigned share to the nursing home. Respondents maintain that the Seventh Circuit fully considered and correctly decided this issue.

Respondents also note that the Eighth Circuit has decided a case related to the issues involved herein, *Herweg v. Ray*, No. 78-1664 (8th Cir., March 18, 1980). That case, however, is legally distinguishable from the conflict between the Seventh and Fifth Circuits because Iowa (the involved state) participates in the Medicaid program pursuant to 42 U.S.C. § 1396a(a)(10)(A) and is known as a "SSI-state" while Indiana and Mississippi participate pursuant to 42 U.S.C. § 1396a(f) and are known as "§ 209(b)"

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[3] Furthermore, petitioner Stanton did not file a cross-appeal of the district court's determination that Mrs. Brown's financial obligations to the nursing home had to be individually determined and thus he has waived his right to request this Court to address the issue.

states. The two different types of states are governed by different "deeming" regulations.[4] Petitioner neither cited to nor relied on *Herweg v. Ray* in his Petition. Nevertheless, to the extent that the Eighth Circuit opinion conflicts with the Seventh Circuit, it is only on the question of whether under 42 U.S.C. § 1396a(a)(17) a state may assume that an able spouse will always actually pay her assigned share to the nursing home. As stated above, it is respondent's position that the Seventh Circuit fully considered and correctly decided that issue.

2. The Decision of the Court of Appeals Concerning Attorneys' Fees Is Correct, Consistent With Prior Decisions of this Court, and Is Not In Conflict With Decisions of Other Circuits.

The court of appeals remanded this case to the district court for a determination of the amount of fees plaintiffs were entitled to as prevailing parties in the district court. The court of appeals held that "the district court, erred in its constricted view that it lacked discretionary authority to award fees where plaintiffs prevailed on a statutory rather than a constitutional claim." No determination has yet been made by the district court on remand regarding attorneys' fees. Thus, the petition for certiorari is premature.

In the petition for certiorari, welfare administrator,

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[4] The deeming regulations for SSI states are at 42 C.F.R. § 435.723(d) while those for § 209(b) states are at 42 C.F.R. §§ 435.734, 436.602, 436.711 and 436.821. *Gray Panthers v. Secretary of H.E.W.*, 461 F. Supp. 319 (D.D.C. 1978), *appeal docketed,* No. 79-1334 (D.C. Cir. March 27, 1979) (oral argument on January 15, 1980) declared the § 209(b) regulations to be contrary to 42 U.S.C. § 1396a(a)(17) and ordered the Secretary to issue new regulations. These new regulations were proposed November 21, 1979, 44 *Fed Reg.* 66855. The Seventh Circuit's decision in *Brown v. Stanton* is in complete harmony with them while the Fifth Circuit's decision is contrary to them.

Wayne A. Stanton, speculates that the effect of the remand by the court of appeals is to deprive the district court of discretion inherent in 42 U.S.C. § 1988 to determine fee awards. At this stage of this case, the petitioners have not suffered any harm and this Court should not grant certiorari to review a decision in which further action by the district court serves to make remote the issue presented to the Court. *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). To put it simply, the Court would have to grasp at straws in the wind to review the attorneys' fees issue.[5]

The decision of the court of appeals that the district court should not deny fees solely because the case was resolved on statutory rather than constitutional grounds is consistent with this Court's decision in *Rosado v. Wyman,* 397 U.S. 400, 402 (1970) and *King v. Smith,* 392 U.S. 309 (1968) as well as *Hagans v. Lavine,* 415 U.S. 528 (1974) and the previous decision of the Court of Appeals for the Seventh Circuit in *Bond v. Stanton,* 555 F.2d 172 (7th Cir. 1977) *cert. denied,* 438 U.S. 916 (1978).

These cases held quite properly that a federal court should avoid determining constitutional questions and resolve cases on statutory or other non-constitutional grounds whenever possible. The district court correctly followed this doctrine in resolving this case on statutory grounds.

The legislative history of the attorneys' fees Act also specifically contemplated that the above approach should be followed and fees awarded in cases ultimately resolved

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[5] In *Gagne v. Maher,* 594 F.2d 336 (2d Cir. 1979), *cert. granted,* 100 S.Ct. 44 (1979), the district court made an actual award of fees in the amount of $3012.19 which presented a clearer case of harm to the state welfare officials in Connecticut. In the instant case, the trial court has not ruled on remand or denied Respondents' petition for attorney fees in the amount of $5184.00.

on statutory grounds. H.R. Rep. No. 1558, 94th Cong., 2d Sess. at 4,n.7 (1976). The petitioner Stanton argued that attorneys' fees should be denied because the statutory claim, alone, is clearly sufficient to obtain the desired relief. It was necessary for the Medicaid recipient and spouse to institute litigation and pursue litigation all the way through a hearing on the merits of the Medicaid deeming issue in order to secure relief. The welfare officials had the option of terminating their illegal policies at any stage of the litigation or before litigation was instituted and thereby limit attorneys' fees. They chose to continue their unlawful deeming practices until enjoined by the district court. The petitioner's logic would encourage state officials to violate clear statutory rights, knowing that a federal court will always resolve the case on the statutory ground: the clearer a statutory right and violation, the less appropriate the award of attorneys' fees.

The decisions cited by the petitioner as creating a conflict with the decision of the court of appeals clearly do not establish any conflict at all. In these cases, *Aho v. Clark,* 608 F.2d 367 (9th Cir. 1979), *Buxton v. Patel,* 595 F.2d 1182 (9th Cir. 1979), and *Zarcone v. Perry,* 581 F.2d 1039 (2d Cir. 1978) *cert. denied,* 439 U.S. 1072 (1979), the Courts distinguished cases which sought damages from those, such as the instant case, which sought only declaratory and injunctive relief. With respect to the latter type of cases, the cases cited by petitioner held that on attorneys' fees petitions based on 42 U.S.C. § 1988, "successful civil rights plaintiffs should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." *Aho v. Clark,* 608 F.2d 365, 367, *quoting Zarcone v. Perry,* 581 F.2d at 1042, which, in turn, was *quoting* from *Newman v. Piggie Park Enterprises, Inc.,* 390

U.S. 400, 402 (1968). The Seventh Circuit decision below is in absolute harmony with these other cases as it remanded to the district court for a determination if any "special circumstances" existed which would render an attorney fee award unjust. Petitioner's Appendix, p. 16. Contrary to petitioner Stanton's contention, the opinion below does not conflict with any of the decisions of the other circuits.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

February 29, 1980.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

ELIZABETH BROWN and JAMES BROWN by his next friend MICHAEL BROWN, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants,* No. 79-1459 vs. WAYNE A. STANTON, individually and as the Administrator of the Indiana Department of Public Welfare, and ELIZABETH SAMKOWSKI, individually and as Director of the Marion County (Indiana) Department of Public Welfare, *Defendants-Appellees.*	Appeal from the United States District Court for the Southern District of Indiana. No. IP 78-773-C James E. Noland Judge

O R D E R

The Slip Opinion filed by this court on January 30, 1980, is hereby amended as follows:

1. Page 9, Line 1—Add an asterisk after the citation 45 C.F.R. § 248.3(b)(2)(i) and a footnote at the bottom of the page to read as follows:

(*) Senior District Judge Robert A. Grant of the United States District Court for the Northern District of Indiana is sitting by designation.

* 43 Fed. Reg. 45204 recodified this provision as 42 C.F.R. § 435.723(c).

2. Page 9, Footnote 10, Line 3—Add a double asterisk after the citation 42 C.F.R. § 448.3(b)(2)(ii) (1977) and an additional footnote at the bottom of the page to read as follows:

   ** 43 Fed. Reg. 54204 recodified this provision as 42 C.F.R. § 435.723(d).

3. Page 14, Line 10—Correct the citation § 435.133 (f) to read § 433.135(f).

4. Page 14—Footnote 14, Line 20—Following the word 'relatives,' add the following language:

   'not to permit presumptions forbidden elsewhere in the statute. Oregon until recently had such a mechanism,'

5. Page 14, Footnote 14, Line 20—Substitute the words 'Medical Assistance' for the words 'Medicaid assistance'.

6. Page 17, Line 12—Correct the citation 594 F.2d 345 to read 594 F.2d 336.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE A. STANTON, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE INDIANA DEPARTMENT OF PUBLIC WELFARE, PETITIONER

v.

ELIZABETH BROWN AND JAMES BROWN, BY HIS NEXT FRIEND, MICHAEL BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Medicaid Act permits a participating state to consider the available income of an applicant's spouse, whether or not actually contributed to the applicant, in determining the applicant's eligibility for medical assistance and the amount of assistance to which the applicant is entitled.[1]

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[1] The United States expresses no opinion concerning the attorneys' fee issue raised in the petition.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

The Medicaid program was established in Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, No. 79-1268 (June 30, 1980), slip op. 1-2. As adopted in 1965, Title XIX required participating states to provide medical assistance to individuals who received cash assistance under any of the four "categorically needy" assistance programs established in the Social Security Act.[2] Under Section 1902(a)(17) of the Act, 42 U.S.C. 1396a(a)(17), each participating state was required to adopt "reasonable standards * * * for determining eligibility for and the extent of medical assistance," taking into account "only such income and resources as are * * * available to the applicant or recipient." Furthermore, in response to practices that had been adopted by states in administering the medical assistance plans established under the predecessor Kerr-Mills program, Congress required participating states to refrain from taking into account "the financial responsibility of any individual for any applicant or recipient of assistance * * * *unless such applicant or recipient is such*

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[2] Old Age Assistance (OAA), Title I, 42 U.S.C. (1970 ed.) 301 *et seq.*; Aid to Families with Dependent Children (AFDC), Title IV, 42 U.S.C. (1970 ed.) 601 *et seq.*; Aid to the Blind (AB), Title X, 42 U.S.C. (1970 ed.) 1201 *et seq.*; Aid to the Permanently and Totally Disabled (APTD), Title XIV, 42 U.S.C. (1970 ed.) 1351 *et seq.* Participating states could also establish "medically needy" programs under which they would offer medical assistance to individuals whose income was greater than permissible under the categorical assistance plans but inadequate to pay medical expenses. Congress thought it appropriate, however, that the medical expenses of the "most needy" be met before extending benefits to the less needy. See, *e.g.*, S. Rep. No. 404, 89th Cong., 1st Sess. 77 (1965).

individual's spouse" or minor, blind, or disabled child. 42 U.S.C. 1396a(a)(17)(D) (emphasis added).

With the approval of the Secretary of Health, Education, and Welfare (now Health and Human Services), some participating states took the position that it was reasonable to expect an applicant's spouse to help pay the cost of the applicant's medical expenses and, therefore, adopted rules that took into account the income of the spouse in determining Medicaid eligibility and the amount of assistance. These states calculated an amount considered necessary to pay the basic living expenses of the applicant's spouse and "deemed" any income of the spouse in excess of that amount as "available" to the applicant. In accordance with Congress' expressed intent that the medical expenses of the "most needy" be met first under the Medicaid program,[3] the amount considered necessary to pay the basic living expenses of the applicant's spouse was set near subsistence level.

In 1972, Congress replaced three of the four categorical assistance programs with a new federal program, Supplemental Security Income for the Aged, Blind, and Disabled (SSI), Title XVI, 42 U.S.C. 1381 *et seq.*[4] From the beginning of the Medicaid program in 1965, participating states were required to provide medical assistance to those individuals receiving benefits under their categorical assistance programs. Adoption of the SSI program was not intended to affect this traditional linkage. But under the SSI program, the states would no longer control the standards of need for the aged, blind, or disabled. Furthermore, the group of individuals who would be eligible for SSI assistance, and therefore eligible for Medicaid assistance, was in some cases significantly larger than the group that was eligible under the prior assistance programs for the aged, blind, and disabled. To avoid forcing the states that participated in the Medicaid program to choose among (1) ex-

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[3] See, *e.g.*, S. Rep. No. 404, 89th Cong., 1st Sess. 77, 78–79 (1965); H.R. Rep. No. 213, 89th Cong., 1st Sess. 66, 68 (1965).

[4] As its name indicates, the SSI program replaced the categorical assistance plans for the aged, blind, and disabled.

panding their Medicaid assistance obligations involuntarily, (2) withdrawing from the Medicaid program, or (3) reducing the level of benefits provided under the Medicaid program, Congress offered the states what has come to be called the "209(b) option," 42 U.S.C. 1396a(f).[5] Under Section 1902(a)(10)(A) of the Act, 42 U.S.C. 1396a(a)(10)(A), all participating states are required to provide medical assistance to any person receiving cash assistance under the SSI program. But pursuant to the "209(b) option" a state may deny medical assistance to any person who, although eligible under the SSI program, would not have been eligible for assistance under the state's Medicaid plan in effect on January 1, 1972.

Under the SSI statute, the income of an applicant's spouse is attributed to the applicant for the purpose of determining eligibility and the amount of assistance.[6] Any state that participates in the Medicaid program but fails to exercise the 209(b) option (an "SSI state") is required to provide medical assistance to all SSI benefit recipients. To avoid the unfairness and administrative difficulties involved in permitting individual SSI states to determine Medicaid eligibility by reference to rules different from those applied in determining SSI eligibility, the Secretary issued regulations requiring SSI states, in making Medicaid determinations, to consider the income of an ap-

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[5] The provision was enacted as Section 209(b) of the Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1381.

[6] When the applicant and his spouse live in the same household, the income of both is considered in determining the eligibility of either for SSI benefits. 42 U.S.C. 1382(a)(2), 1382c(b), (f)(1). When the applicant and his spouse cease to share the same household, the income of the applicant's spouse is no longer considered in determining the applicant's eligibility for SSI benefits, unless the applicant's spouse is an "eligible spouse," as defined in 42 U.S.C. 1382c(b). Because of the definition of "eligible spouse," no one can remain an "eligible spouse" for more than six months after separation from his spouse. 42 U.S.C. 1382c(b).

plicant's spouse only to the extent required by the SSI statute. 42 C.F.R. 435.723.[7]

In addition, the Secretary required states that exercised the 209(b) option to consider the income of an applicant's spouse in determining Medicaid eligibility and the level of benefits at least to the extent that it would be considered in a SSI state.[8] 42 C.F.R. 435.734. Section 209(b) of the 1972 amendments, 42 U.S.C. 1396a(f), however, authorized the states that exercised the option to apply the more restrictive eligibility standards of their 1972 Medicaid programs. Therefore, the Secretary determined that it would be appropriate to allow Section 209(b) states to consider the income of an applicant's spouse to the extent they would have done so under their 1972 Medicaid plans. 42 C.F.R. 435.734.

2. Respondents, on behalf of themselves and others similarly situated, brought suit in the United States District Court for the Southern District of Indiana, challenging the Medicaid deeming practices of Indiana, a 209(b)

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[7] For example, without such regulations, if an applicant became eligible for and received SSI benefits because his noneligible spouse no longer lived in his home and therefore her income was not attributed to him, he would be eligible for Medicaid benefits in an SSI state. But if the same individual were unwilling to accept SSI benefits and applied directly to the state Medicaid agency for benefits under a program for the "medically needy" with higher income standards, he might nevertheless be denied medical assistance if the state Medicaid rules continued to take into account the income of his spouse. This discrimination between needy individuals and equally needy individuals who, for their own reasons, are unwilling to accept SSI benefits clearly was not intended by Congress. See 40 Fed. Reg. 60074 (1975).

[8] If, in SSI states, the term "available" income, as used in 42 U.S.C. 1396a(a)(17), now included the income of an applicant's spouse to the extent required by the SSI statute, the Secretary reasoned that the term should be interpreted in the same manner in 209(b) states. Moreover, the 209(b) option was only intended to allow participating states to avoid expanded Medicaid obligations because of the more liberal eligibility criteria of the SSI statute. It was not intended to permit participating states to receive federal assistance for the purpose of providing medical assistance to individuals who were ineligible even under the SSI criteria. See S. Rep. No. 92-1230, 92d Cong., 2d Sess. 222 (1972).

state, as inconsistent with the requirements of Section 1902(a)(17) of the Social Security Act, 42 U.S.C. 1396a(a)(17), and the Equal Protection Clause of the Fourteenth Amendment.[9] Finding the statutory contention dispositive, the district court did not reach respondents' constitutional claims (Pet. App. 21–A). The district court held (Pet. App. 25–A) that under Section 1902(a)(17) Indiana cannot use a formula for determining what part of the income and resources of an applicant's spouse is "available" to the applicant, but must instead make individualized factual determinations in each case, giving "'due consideration to the individual obligations and the particular needs of each spouse and family,'" quoting *Herweg* v. *Ray*, 443 F. Supp. 1315, 1319 (S.D. Iowa 1978), aff'd by an equally divided court, 619 F.2d 1265 (8th Cir. 1980), petition for cert. pending, No. 80–60 (filed July 14, 1980). The district court did not reach respondents' additional contention that under Section 1902(a)(17) a participating state could not consider a spouse's income as "available" to the applicant if he refused to contribute to the applicant's medical care.[10]

Respondents sought review of the district court decision, arguing that it did not go far enough in requiring compliance with Section 1902(a)(17).[11] The court of appeals agreed with the district court that Section 1902(a)(17) requires participating states to make individualized factual

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[9] The district court certified a class comprised of "all named institutionalized persons who have been, are or will be recipients of the Indiana Medicaid Program and their non-institutionalized spouses who have or will have their incomes and resources 'deemed' available to said institutionalized spouses by Indiana State Department of Public Welfare Regulation 2-214 * * *" (Pet. App. 18–A).

[10] The district court denied respondents' request for attorneys' fees under 42 U.S.C. 1988 (Pet. App. 25–A to 26–A).

[11] Respondents also argued that the district court had abused its discretion in denying attorneys' fees. Petitioner did not cross-appeal and therefore did not challenge the district court's holding that Section 1902(a)(17) requires participating states to conduct individualized factual inquiries to determine what part of the income of an applicant's spouse is "available."

determinations as to how much of the income of an applicant's spouse is "available" for purposes of evaluating medicaid eligibility and the amount of assistance to which an institutionalized applicant is entitled (Pet. App. 5-A). But the court of appeals held that Section 1902(a)(17) also requires participating states to ignore the amount determined to be "available" from the spouse, unless the money is actually contributed. According to the court of appeals, Indiana could seek to recoup the amount determined to be available by filing a lawsuit (presumably under state law) against the non-contributing spouse (Pet. App. 11-A):

> In light of the Indiana spousal support statute, * * * we hold that the state welfare agency is required to make an upward adjustment in Medicaid benefits to compensate for the portion left unpaid by an unwilling spouse, and then to proceed under the above statute to seek reimbursement directly from the unwilling spouse.

The court of appeals also held that respondents were entitled to attorneys' fees and remanded the issue to the district court for further consideration (Pet. App. 16-A to 17-A).

Judge Pell dissented in part from the court's construction of the Medicaid Act. Judge Pell agreed that a state may not "deem" the income of an applicant's spouse without making an individualized determination of need, but he disputed the court's holding that the state must pay *all* the medical expenses of a Medicaid applicant even if he has a spouse able but unwilling to pay part of those expenses. Judge Pell remarked (Pet. App. 17-A):

> I think it unrealistic to think that the state will engage in a multiplicity of continuing individual lawsuits to recover money that it should not have had to pay out in the first place. Under the majority opinion, there is an open invitation for the spouse to decide that he or she does not wish to make the * * * payment. In this era of inflation, and giving consideration to the human inclination not to pay out money when one doesn't have to, I think it reasonable to conclude that few would decline the invitation.

DISCUSSION

1. The holding of the court of appeals in this case directly conflicts with the holding of the Fifth Circuit in *Norman* v. *St. Clair*, 610 F.2d 1228 (1980), petition for cert. pending *sub nom. Harris* v. *Norman*, No. 80-498 (filed Sept. 27, 1980). In *Norman*, the Fifth Circuit concluded that the language and legislative history of Section 1902(a)(17) of the Act, 42 U.S.C. 1396a(a)(17), indicates that "Congress intended that income deemed from a spouse to be a part of the 'available' income which the state may consider in determining [Medicaid] eligibility." 610 F.2d at 1237.[12] The Fifth Circuit specifically rejected the interpretation of Section 1902(a)(17) adopted by the Seventh Circuit in this case:

> We must reject plaintiffs' contention that 42 U.S.C. § 1396a(a)(17)(D) merely authorizes the states to invoke formal financial responsibility proceedings for the support of spouses. We hold instead that 42 U.S.C. § 1396a(a)(17)(D) permits states to deem income from one spouse available to the other and that such deemed income is part of the "available" income which states may compute under 42 U.S.C. § 1396a(a)(17)(B).

610 F.2d at 1237. Nothing in Section 1902(a)(17) requires a participating state to ignore the income of an applicant's spouse in determining eligibility for or the amount of Medicaid assistance or limits the state's remedies to a recoupment lawsuit against the unwilling spouse.

Similarly, the Seventh Circuit's decision conflicts with the Eighth Circuit's judgment in *Herweg* v. *Ray*, 619 F.2d 1265 (1980), aff'g by an equally divided court 443 F.Supp.

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[12] In *Harris* v. *Norman*, No. 80-498, the Secretary of Health and Human Services seeks review of the Fifth Circuit's additional holding that Section 1902(a)(17) requires participating states to incorporate a "flexible means" test in determining what part of the income of an applicant's spouse is "available" to the applicant for purposes of determining Medicaid eligibility and the amount of assistance, notwithstanding the provisions of 42 U.S.C. 1396a(f)—the 209(b) option—and the Secretary's regulations that do not require a "flexible means" test.

1315 (S.D. Iowa 1978), petition for cert. pending, No. 80-60 (filed July 14, 1980).[13] Although erroneously holding that Section 1902(a)(17) requires SSI states to make individualized determinations as to how much of the income of an applicant's spouse is "in fact reasonably available for the support of the institutionalized spouse," 443 F. Supp. at 1319, the district court decision, affirmed by the Eighth Circuit, makes plain that the provision was not "'intended to permit one spouse to spurn a normal obligation to support and assist the other merely by refusing to make contributions.'" *Ibid.*, quoting *Franssen* v. *Juras*, 406 F. Supp. 1375, 1378 (D. Ore. 1975).[14]

The Seventh Circuit's decision does not conflict with the holding in *Gray Panthers* v. *Administrator, Health Care Financing Administration*, No. 79-1334 (D.C. Cir. July 29, 1980). It is, however, inconsistent with the D.C. Circuit's conclusion that the legislative history of the Medicaid statute "establishes a broad principle, or expectation, that 'deeming' is appropriate between spouses * * *." Slip op. 11.[15]

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[13] The petition for certiorari in *Herweg* seeks review of the district court's further holding that SSI states such as Iowa may consider the income of an applicant's spouse for Medicaid purposes even in circumstances where the income would not be considered in making SSI eligibility determinations.

[14] Although respondents contend (Br. in Opp. 7-8) that *Herweg* is distinguishable because Iowa is an SSI state, they then seem to concede that the Eighth Circuit's affirmance of the district court's judgment is contrary to the decision of the Seventh Circuit on the question of whether a state must (i) ignore the income of a spouse in determining Medicaid eligibility or the amount of assistance and (ii) later attempt to recoup the amount found to have been overpaid (see *id.* at 8). Since Section 1902(a)(17) governs the standards for Medicaid eligibility in both 209(b) states and SSI states, Iowa's status as an SSI state is irrelevant for these purposes.

[15] The D.C. Circuit erroneously went on to hold, however, that in adopting the regulations applicable in 209(b) jurisdictions, the Secretary failed to consider several "relevant" factors and "policy concerns." Slip op. 14. The Solicitor General has authorized the filing of a petition for a writ of certiorari to challenge this holding.

The conflict between the holding of the Seventh Circuit and that of the Fifth Circuit in *Norman* v. *St. Clair* is clear, but each of the four recent court of appeals decisions discussed above is to some extent irreconcilable with the others. Each of these decisions is based, at least in part, on an interpretation of 42 U.S.C. 1396a(a)(17), one of the fundamental provisions governing Medicaid eligibility. The divergent interpretations of the courts of appeals have posed serious problems for the Secretary in supervising the administration of state Medicaid programs.

The Seventh Circuit's decision in this case is particularly egregious. First, it ignores the language of Section 1902(a)(17)(D) and imposes a wholly impractical and costly burden on the State of Indiana. Second, it disregards the Secretary's regulations and the terms of the Section 209(b) option, 42 U.S.C. 1396a(f). Indeed, the court of appeals decision in this case is fundamentally inconsistent with the statutory scheme Congress established and effectively *reverses* the intended effect of the 209(b) option. We believe that, in view of the conflict among the circuits and the importance of the issue presented, this Court should grant the petition for a writ of certiorari.

2. In light of the practices that arose in connection with the administration of the Kerr-Mills medical assistance plans, Congress prohibited the consideration of the financial responsibility or income of any Medicaid applicant's relative, except the applicant's spouse or parent. Section 1902(a)(17)(D) provides:

> A state plan for medical assistance must—include reasonable standards * * * for determining eligibility and the extent of medical assistance * * * [that] do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan *unless such applicant or recipient is such individual's spouse or such individual's child* * * *.

42 U.S.C. 1396a(a)(17)(D) (emphasis added). This provision specifically permits a participating state to take the income of an applicant's spouse into account in "determining eligibility and the extent of medical assistance." The

legislative history of the provision is equally clear: the House and Senate committees remarked that "it is proper to expect spouses to support each other and parents to be held accountable for the support of their * * * children * * *." H.R. Rep. No. 213, 89th Cong., 1st Sess. 68 (1965); S. Rep. No. 404, 89th Cong., 1st Sess. 78 (1965). Yet, the court of appeals has required Indiana to ignore the available income of an applicant's spouse in determining eligibility and the amount of assistance, whenever the spouse is unwilling to pay.

As Judge Pell pointed out in dissent, a great many spouses are likely to accept the invitation offered by the court's opinion. In the Secretary's view, the Medicaid Act does not require participating states to initiate countless costly and time-consuming lawsuits against spouses unwilling to contribute in order to recoup money they never should have been required to pay under the statute. Congress committed the federal government to give financial assistance to states that chose to provide medical assistance to needy individuals, but it left the determination of "need" largely to the discretion of the states. It cannot reasonably be asserted that Congress *implicitly required* the states to provide medical assistance to individuals who the states concluded were not "needy" and then to file a lawsuit to attempt to recover the money. In light of the intolerable burden on participating states and the strong disincentive for participation that would result from such a statutory scheme, there surely would have been some discussion of the issue if that had been Congress' intent.

3. Pursuant to authority expressly delegated in Section 1902(a)(17), the Secretary has adopted regulations interpreting the term "available" income to include the income of an applicant's spouse at least to the extent that it would be considered in determining eligibility under Title XVI of the Social Security Act (SSI). See 42 C.F.R. 435.723, 435.734.[16] These regulations must be given legislative ef-

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[16] The court of appeals notes (Pet. App. 8–A n.10) that Mrs. Brown (the applicant's spouse in this case) was not an "eligible spouse," as defined in the SSI statute. But see note 9, *supra*. The HHS regula-

fect. *Batterton* v. *Francis*, 432 U.S. 416, 425–426 (1977). A reviewing court is not free to ignore such regulations solely because it would have adopted a different interpretation of the statutory phrase. See *id.* at 425.

The Secretary's regulations are not arbitrary or capricious or otherwise contrary to law. The court of appeals did not find that the regulations are unlawful.[17] Rather, the court of appeals held that Section 1902(a)(17) requires the states to adopt the impractical and costly recoupment procedure described in the court's opinion. We submit that the court of appeals should have followed the Secretary's interpretation of the phrase "available" income and should not have imposed the additional requirement that the available money of an applicant's spouse be actually contributed.

The HHS regulations applicable in 209(b) jurisdictions are consistent with the provisions of Section 1902(a)(17) and further the intent of Congress in adopting 42 U.S.C. 1396a(f). Section 1902(a)(17) requires participating states to consider only "available" income, leaving to the Secretary the task of defining that term. The statute does not require the states to ignore available income in determining eligibility or the amount of assistance simply because the spouse is unwilling to contribute it. In accordance with the link between Medicaid eligibility and eligibility under the categorical assistance programs, and to avoid the unfairness and administrative difficulties involved in permitting the 35 SSI states to apply Medicaid criteria different from those used in determining SSI eligibility, the Secretary required all SSI states to use the SSI criteria for Medicaid purposes as well.

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tions, therefore, did not require Indiana to consider her income in determining Mr. Brown's eligibility, but permit Indiana to consider her income if it would have done so under its 1972 Medicaid plan. In any event, the court of appeals' interpretation of Section 1902(a)(17) is not limited by the status of the non-institutionalized spouse.

[17] Indeed, the regulations applicable in 209(b) states were not even mentioned in the court of appeals' decision, although the court noted the SSI regulations (Pet. App. 8-A).

Since Section 1902(a)(17) is no less applicable in SSI states than in 209(b) states, the Secretary reasonably determined that the term "available" income should be interpreted in a similar manner in 209(b) states. Furthermore, the 209(b) option was intended to permit participating states to exclude from coverage individuals who would be eligible under the SSI criteria, and therefore eligible for Medicaid coverage (see 42 U.S.C. 1396a (a)(10)(A)), but who would not have been eligible under the more restrictive standards of the 1972 state Medicaid plans. See S. Rep. No. 92-1230, 92d Cong., 2d Sess. 222 (1972). See also S. Rep. No. 93-553, 93d Cong., 1st Sess. 56 (1973). The purpose of the 209(b) option was to avoid imposing expanded Medicaid obligations on participating states, as a result of the more liberal SSI eligibility requirements. It was not intended to permit states to cover individuals who would not be eligible even under the more liberal SSI criteria.[18] Thus, in requiring 209(b) states to adopt the SSI standards for considering the income and resources of a Medicaid applicant's spouse but permitting those states to apply standards as restrictive as those found in their 1972 Medicaid plans, the Secretary's regulations are consistent with both Section 1902(a)(17) and Congress' intent in adopting 42 U.S.C. 1396a(f).

More generally, the Seventh Circuit's decision in this case is fundamentally inconsistent with the statutory scheme that Congress has established. From the outset, Congress has only required participating states to provide medical assistance to the "most needy." Initially, mandatory medical assistance was tied to receipt of cash benefits under one of the state-administered categorical assistance programs. When Congress enacted the federal SSI program to replace the state-administered programs for the aged, blind, and disabled, it maintained the linkage be-

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[18] If the states choose to adopt a "medically needy" program, see 42 U.S.C. 1396a(a)(10)(C), they will of course provide medical assistance to individuals who are not eligible under the SSI standards, but that was not the purpose of the 209(b) option, except to the extent that the "spend-down" clause of 42 U.S.C. 1396a(f) has that effect.

tween mandatory Medicaid coverage and receipt of benefits under a categorical assistance program. Yet, the decision of the Seventh Circuit requires Indiana to provide medical assistance to individuals without regard to whether they are the "most needy," as defined by either the SSI eligibility criteria or Indiana's 1972 Medicaid plan.[19] Instead, the Seventh Circuit effectively substitutes the willingness of an institutionalized individual's spouse to contribute as the test of "need." This decision is erroneous and warrants further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[19] As noted above, Indiana's status as a 209(b) state makes the court's decision wrong for a second reason. The purpose of 209(b) was to allow participating states to refuse to provide medical assistance to some individuals who receive SSI benefits. The decision of the court of appeals *requires* Indiana to provide medical assistance to individuals who may or may not be eligible under the SSI criteria.

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